

Seri Bahan Bacaan Kursus HAM untuk Pengacara X  
Tahun 2005

Materi : Prosedur Komplain

**PROSEDUR KOMPLAIN DI BAWAH  
MEKANISME DAN SISTEM  
PERSERIKATAN BANGSA-BANGSA**

**Patra M. Zein, S.H., LL.M**



**Lembaga Studi dan Advokasi Masyarakat**

Jl Siaga II No 31 Pejaten Barat, Jakarta 12510

Telp (021) 7972662, 79192564 Fax : (021) 79192519

Website : [www.elsam.or.id](http://www.elsam.or.id) Email : [elsam@nusa.or.id](mailto:elsam@nusa.or.id)



## Prosedur Komplain di Bawah Mekanisme dan Sistem Perserikatan Bangsa-Bangsa

Prosedur komunikasi dan komplain dalam mekanisme dan sistem Perserikatan Bangsa-Bangsa (PBB) digunakan sebagai aktivitas pencarian *judicial remedies* di level internasional, bagi para korban kejahatan hak asasi manusia (HAM). Tujuannya, antara lain : mendapatkan dorongan dan desakan komunitas di level global kepada Negara dalam pemenuhan hak asasi manusia (HAM). Walaupun aktivitas ini bersifat komplementer, penggunaan prosedur ini dalam skala tertentu dapat memicu perbaikan-perbaikan situasi di level domestik.

Karena pengaruh tersebut, intensitas pembawaan dan kampanye persoalan-persoalan HAM ke PBB dilakukan ribuan orang setiap tahun melalui mekanisme yang ada. Tulisan ini akan memberikan gambaran prosedur-prosedur yang seringkali digunakan untuk meminta PBB berbuat sesuatu atas problem pemenuhan HAM yang terjadi.

### A. Prosedur di Bawah Perjanjian dan Prosedur Khusus

Komplain di bawah hukum internasional HAM yang utama : dilakukan lewat alas acuan perjanjian-perjanjian (*treaties*) dan prosedur khusus yang disediakan Komisi HAM (*Commission on Human Rights*) – juga Komisi Status Perempuan (*Commission on the Status of Women*).

Prosedur di bawah perjanjian, setidaknya mulai digunakan – dan dikembangkan mekanismenya, sejak periode awal 1970. Komplain dilakukan di bawah aturan : Kovenan Internasional tentang Hak-hak Sipil dan Politik (ICCPR); Konvensi Menentang Penyiksaan (CAT); Konvensi Anti Diskriminasi Rasial (CERD); dan Kovenan Anti Diskriminasi terhadap Perempuan (CEDAW). Sesuai dengan tajuk konvensi, komplain atau keluhan didasarkan pada klausa dan klasifikasi HAM yang ada di masing-masing perjanjian. Upaya ini ditujukan kepada sebuah *komite quasi-judicial*, yang selanjutnya melakukan examinasi atas komplain-komplain yang diterimanya. Mekanisme yang sama berlaku juga untuk prosedur komplain kepada Komisi HAM dan Komisi Status Perempuan, dimana kedua komisi ini melibatkan lembaga politik yang beranggotakan perwakilan dari Negara.

Komplain yang diajukan pada komite diistilahkan sebagai “komunikasi” atau “petisi”. Masing-masing petisi ini mempunyai form khusus yang meminta penyediaan informasi spesifik termasuk korespondensi yang ada. Beberapa hal yang penting dalam menggunakan mekanisme prosedur, sebagai berikut :

1. Memberikan informasi-informasi dasar personal;
2. Mengajukan petisi dengan segera – walaupun tidak ada aturan soal batas waktu;



Prosedur pengajuan petisi : Jika petisi kita dieksaminasi Komite, kita akan mendapat *advice of registration*. Komite akan mengirimkannya ke Negara untuk meminta komentar atas petisi kita. Jika Negara memberikan komentarnya, pengaju petisi diberikan kesempatan untuk memberikan komentar balik. Jika Negara tidak mau merespon permintaan Komite, maka komite selanjutnya dapat mengambil keputusan berdasar petisi original kita.

Petisi yang dieksaminasi Komite dengan melewati dua tahap : "*admissibility*" dan "*merits*". *Admissibility*, kasus merujuk pada persyaratan formal dimana komplain kita harus jelas sebelum komite memeriksanya, menyangkut antara lain : otorisasi pengaju petisi; berkesuaian dengan provisi-provisi dalam perjanjian (*ratione materiae*). Sedangkan, "*merits*", dimana kasus dipertimbangkan sudah dimengerti dengan baik, dimana komite memutuskan apakah hak-hak yang dijelaskan dalam petisi memang sudah dilanggar.

Komite dibekali kapasitas untuk mengambil *urgent action* jika dianggap perlu. Mekanisme berdasarkan *interim action* yang dilakukan komite ("*interim measures*") untuk mencegah problem HAM yang lebih serius, seperti *urgent action* atas kasus deportasi seseorang yang menghadapi resiko penyiksaan jika dilakukan. Pendeknya, "*interim measures*" ini digunakan berdasarkan isu yang mendesak dan tidak dapat ditunda atau diulang di masa selanjutnya. Jika kita ingin komite mempertimbangkan upaya ini, mesti secara eksplisit dimuat dalam petisi yang kita buat – dengan tentu saja menjelaskan dengan rinci dan dengan argumen yang kuat mengapa upaya ini diperlukan.

Dalam keputusan yang nantinya dibuat Komite, kita juga dapat meminta Komite untuk tidak memuat nama individu jika dianggap membahayakan kepentingan personal. Permintaan ini akan dipertimbangkan komite sebelum keputusan finalnya menjadi dokumen publik. Paska keputusan dibuat, komite dapat mengundang Negara untuk memberikan informasi dengan waktu tiga bulan tentang langkah-langkah yang diambil berkaitan dengan problem HAM yang terjadi.

## B. Prosedur 1503

Prosedur 1503, merupakan prosedur komplain tertua dalam sistem PBB. Digunakan di bawah mekanisme Komisi HAM berdasarkan *Economic and Social Council Resolution 1503 (XLVII)*, 27 Mei 1970. Dalam prosedur ini, komplain lebih bersifat umum, ketimbang individual. Serta diajukan dalam kasus-kasus yang kualifikasinya kejahatan berat. Di tahun 2000, terjadi amandemen prosedur (*revised 1503 procedure*) dengan tujuan untuk memfasilitasi lebih banyak dialog dengan Pemerintah dan menyediakan peluang debat yang efektif dalam Komisi ini.

Prosedur 1503 dapat digunakan untuk Negara mana pun, tanpa harus mempertimbangkan apakah Negara ini telah meratifikasi perjanjian yang ada. Sekali kita mengajukannya, kita tidak lagi melakukan respon di tahapan selanjutnya. Komplain ditujukan ke Kantor Komisioner Tinggi HAM (OHCHR) di Jenewa, Swiss. Komplain ini dieksaminasi oleh mekanisme Komisi HAM, level tertinggi dalam *UN human rights machinery*, yang dapat memberikan dorongan dan desakan kepada Negara, karena sifat lembaga ini merupakan lembaga politik. Namun, kelemahannya, jika kita menggunakan prosedur ini, kita tidak mendapatkan informasi tentang putusan-putusan yang diambil, beserta alasan mengapa putusan semacam itu yang dijatuhkan. Prosedur 1503



Kursus HAM untuk Pengacara X, 2005  
Bahan Bacaan  
Materi : Prosedur Komplain

dapat juga digunakan dan ditujukan kepada Komisi Status Perempuan, yang bertujuan untuk mengidentifikasi trend global dan pola-pola problem hak asasi perempuan.

Sebagai tambahan, Indonesia pernah dieksaminasi oleh Komisi HAM. Eksaminasi terjadi periode 1978 – 1981 (*sessi 34<sup>th</sup> – 37<sup>th</sup>*), dan periode selanjutnya, 1983 – 1985 (*39<sup>th</sup> – 41<sup>th</sup>*). Eksaminasi, menyangkut aneksasi militer Indonesia ke Timor Leste.



## Beberapa Istilah Umum dalam Prosedur Komplain di Bawah Perjanjian Internasional HAM<sup>1</sup>

**accession/accede.** "Accession" describes one method by which a state can choose to be bound by the obligations in a treaty. The date the state deposits its instrument of "accession" with the Secretary General of the United Nations will determine the date the state becomes bound by the treaty obligations. See also "ratification."

**admissible/admissibility.** Admissibility refers to rules concerning the handling of individual cases. The human rights treaties, together with the Rules of Procedure of the relevant treaty bodies, establish certain pre-conditions that must exist before a treaty body is entitled to consider the merits of an individual complaint. If those pre-conditions are met, the complaint is "admissible" and the treaty body can proceed to consider the substance of the complaint. The "admissibility" phase of the decision-making process is the prior phase during which the treaty body considers whether the conditions of admissibility are met.

**amendment.** The alteration of a treaty by subsequent agreement of the states parties. A treaty may provide for an amendment to come into force upon acceptance by a certain number or percentage of states parties. An amendment may have to be separately agreed upon by a state party in order for it to become bound by the change.

**applicant.** See "author" or "complainant".

**application.** See "communication" or "complaint".

**author.** The term used by the Human Rights Committee, CERD and CEDAW to refer to the person who lodges the individual complaint of a violation of his or her rights. Also known as "complainant", "applicant" or "petitioner." See also "complainant".

**communication.** The term used by the Human Rights Committee, CERD and CEDAW to refer to an individual complaint brought to the treaty bodies complaining of a violation of the individual's rights under the treaty. Also known as "petition", "complaint" or "application". See also "complaint".

**complaint.** The term used by CAT to refer to an individual complaint brought to the treaty bodies complaining of a violation of the individual's rights under the treaty. Also known as "petition", "application", "communication". See also "communication".

**complainant** The term used by CAT to refer to the person who lodges the individual complaint of a violation of his or her rights. See also "author", "applicant" or "petitioner."

---

<sup>1</sup> Lihat [http://www.bayefsky.com/complain/2\\_glossary.php](http://www.bayefsky.com/complain/2_glossary.php)



**concluding comments.** The final statement issued by a human rights treaty body at the conclusion of its examination of a state party's report, in which the treaty body comments on the state party's record of implementation of the treaty. Also called "concluding observations".

**concluding observations.** The final statement issued by a human rights treaty body at the conclusion of its examination of a state party's report, in which the treaty body comments on the state party's record of implementation of the treaty. Also called "concluding comments".

**convention.** A kind of treaty. See "treaty".

**covenant.** A kind of treaty. See "treaty".

**decision.** In the context of CAT the findings on the merits of individual complaints. See also "Opinions" and "Views".

**declaration.** A statement made by a state when signing or adhering to a treaty in which it claims to define the legal effect of certain provisions of the treaty in their application to that state. Sometimes states make "interpretive declarations" in which they express their understanding of a particular aspect of the interpretation of the treaty. See also "declarations of competence", "reservation".

**declaration of competence.** A declaration made by a state party (usually upon ratification, but potentially later) in which it recognizes the competence of the relevant treaty body to exercise certain optional functions under the treaty. For example, in the context of the CERD and CAT treaties, states parties have the option to make declarations in which they recognize the competence of the relevant treaty bodies to consider individual communications.

**derogate/derogation/derogable.** To "derogate" means to suspend. In the context of the human rights treaties, a "derogation" is a suspension of the application of a right, allowable only in certain defined circumstances of public emergency. For example, the CCPR limits the circumstances in which states parties are entitled to "derogate from" the enjoyment of certain rights contained in the Covenant in times of official public emergency. Rights which are "non-derogable" cannot be suspended under any circumstances.

**domestic remedies.** National judicial and administrative opportunities for redress that should be engaged before a petitioner applies to a treaty body.

**entry into force.** A treaty will only become operational, or enter into force, after certain conditions have been satisfied. These conditions often require a certain minimum number of ratifications by states. A treaty will enter into force for a particular state which ratifies only after the treaty has become operational (or entered into force), normally following a time lapse which has been specified in the treaty.

**follow-up.** The actions taken (if any) following the finding of a violation in an individual communication, in order to determine whether the state party has complied with the treaty body's recommendations.



**general comment.** A general statement issued by the treaty body that provides guidance on the interpretation of procedural and substantive requirements of the treaty. The Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee Against Torture, and the Committee on the Rights of the Child, refer to these statements as "General Comments". The Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women refer to these statements as "General Recommendations".

**general recommendation.** A general statement issued by the treaty body that provides guidance on the interpretation of procedural and substantive requirements of the treaty. The Committee on the Elimination of Racial Discrimination and the Committee on the Elimination of Discrimination Against Women refer to these statements as "General Recommendations". The Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee Against Torture, and the Committee on the Rights of the Child, refer to these statements as "General Comments".

**interim measure.** A measure that a treaty body asks a state party to take on an interim or temporary basis, in order to avoid irreparable harm to the interests of the complainant, before the treaty body has the opportunity to determine the merits of the complaint.

**merits.** The substantive correctness, or otherwise, of a complainant's allegation that a right under one of the treaties has been violated. The treaty body's consideration of the merits follows its consideration of the issue of admissibility.

**monitoring body.** See "treaty body".

**multilateral treaty.** A treaty that has more than two states parties.

**non-governmental organization (NGO).** A privately constituted organization.

**opinions.** In the context of CERD, the Committee calls its findings on the merits of individual complaints "Opinions". See also "Views" and "Decisions"

**optional protocol.** A separate treaty associated with a parent treaty, under which states parties to the parent treaty may choose to undertake additional obligations. Not all states which have ratified the original treaty may have ratified the optional protocol.

**petition.** See "communication" or "complaint".

**petitioner.** See "author" or "complainant".

**plenary.** The treaty body meeting formally as a whole, in accordance with its formal rules of procedure.

**protocol.** A kind of treaty. See "treaty", "optional protocol"



**rappporteur.** One member of the relevant treaty body that has been assigned certain special tasks to undertake on behalf of the treaty body. There are, for instance, special rapporteurs on New Communications (the Human Rights Committee), on Interim Measures (CAT), and on Follow-up (the Human Rights Committee).

**ratification/ratify.** "Ratification" describes one method by which a state can choose to be bound by the obligations in a treaty. The date the state deposits its instrument of ratification with the Secretary General of the United Nations will determine the date the state becomes bound by the treaty obligations. See also "accession."

**reservation.** A statement made by a state when ratifying a treaty, in which it claims to exclude or to modify the legal effect of certain provisions of the treaty in their application to that state. See "declaration".

**secretariat.** United Nations staff that are responsible, amongst many other tasks, for giving administrative support to the treaty bodies. The Secretariat is formally headed by the Secretary-General of the United Nations. The staff of the treaty bodies is made up primarily of lawyers and come from all regions of the world.

**signature.** By signing a treaty, a state signals its intention to become bound by its provisions. However, a state does not actually become bound until it takes the further step of "ratification" or "accession". Until the state ratifies or accedes to the treaty, it is not a party to it, although it must refrain from acts that would defeat the object and purpose of the treaty. Sometimes a state will sign a treaty but then never take the further step of ratification or accession.

**special rapporteur.** See "rapporteur".

**special procedures.** These are human rights mandates which have been created by the Commission on Human Rights and which may be individuals or working groups that study a particular human rights theme or the human rights record of a particular state.

**state.** A country that is recognized as a separate sovereign entity by other states.

**state party.** A state that has either ratified or acceded to a particular treaty, thereby becoming bound by its provisions.

**state report.** A report submitted by a state party to the relevant treaty body on its progress in giving effect to the rights recognized in the treaty. All of the human rights treaties require states parties to submit states reports at regular intervals.

**state-to-state complaint.** A procedure available under many of the human rights treaties (although usually on an optional basis) under which states parties to the relevant treaty can complain to the treaty body that another state party is not fulfilling its obligations under the treaty.



Kursus HAM untuk Pengacara X, 2005

Bahan Bacaan

Materi : Prosedur Komplain

**treaty.** An agreement entered into by two or more states, which creates binding rights and obligations in international law. A treaty may go by many different names, such as "convention", "covenant" and "protocol."

**treaty body.** A committee of independent experts who are responsible for monitoring the implementation by states parties of their obligations under the treaty. Each of the human rights treaties has a treaty body associated with it. Also called a treaty "monitoring body"

**views.** In the context of CCPR and CEDAW, their findings on the merits of individual complaints. See also "Opinions" and "Decisions"

**working group.** A group of members of a particular treaty body that meet outside of the formal framework of committee meetings to perform certain functions that have been delegated to them by the treaty body.